

U.S. Department of Labor

Board of Alien Labor Certification Appeals
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Issue Date: 20 January 2012

BALCA Case No.: 2010-PER-01561
ETA Case No.: A-08025-17328

In the Matter of:

ALLIANCEBERNSTEIN L.P.,
Employer

on behalf of

DEEPAK TIWARI,
Alien.

Certifying Officer: William L. Carlson
Atlanta National Processing Center

Appearances: Kevin W. Miner, Esquire
Atlanta, Georgia
For the Employer

Gary M. Buff, Associate Solicitor
Harry L. Sheinfeld, Counsel for Litigation
Office of the Solicitor
Division of Employment and Training Legal Services
Washington, D.C.
For the Certifying Officer

Before: **Romero, Avery, and Kennington**
Administrative Law Judges

DECISION AND ORDER
AFFIRMING DENIAL OF CERTIFICATION

This matter arises under Section 212(a)(5)(A) of the Immigration and Nationality Act, 8 U.S.C. §1182(a)(5)(A), and the “PERM” regulations found at Title 20, Part 656 of the Code of Federal Regulations (C.F.R.).

BACKGROUND

On January 25, 2008, the Certifying Officer (CO) accepted for processing Employer's Application for Permanent Employment Certification (ETA Form 9089) for the position of "Senior Programmer Analyst." (AF 144-159).¹ Because the application was for a professional position, Employer listed three types of professional recruitment, one of which was recruitment through a private employment firm. (AF 148).

On March 21, 2008, the CO notified Employer that its ETA Form 9089 was selected for audit. (AF 141-143). Among other documentation, the CO directed the Employer to submit its recruitment documentation. (AF 141). Employer responded on April 18, 2008. (AF 17-140). As documentation of its recruitment efforts through a private employment firm, Employer submitted several contracts with different employment firms dated from May 2007 through July 2007. The agreement letters stated, "AllianceBernstein will recognize as a bona fide referral, for the purpose of determining fee obligations, only those resumes sent by agencies at the request of an authorized member of AllianceBernstein's Human Resources Department or a designated member of Bernstein." (AF 96-139).

On March 9, 2010, the CO denied certification of Employer's application on the ground that Employer failed to provide adequate documentation of recruitment through a private employment firm as required by 20 C.F.R. § 656.17(e)(1)(ii)(F). (AF 14-16). The CO found that the documentation did not meet the regulatory requirements because it did not confirm that Employer requested resumes for the job opportunity listed on the ETA Form 9089. (AF 15).

Employer requested reconsideration on April 2, 2010. (AF 3-14). Employer argued that the CO misinterpreted the contracts. Employer claimed the contracts allow the firms to send any resumes to Employer it believed would be of interest. Employer argued 20 C.F.R. § 656.17(e)(1)(ii)(F) does not require that the employment firm engage in a campaign for the specific position. (AF 6). On September 3, 2010, the CO issued a letter of reconsideration. (AF 1-2). The CO determined Employer's request did not overcome the deficiency stated in the determination letter. The CO concluded that

¹ In this decision, AF is an abbreviation for Appeal File.

Employer “failed to provide documentation sufficient to verify the recruitment effort conducted by the private employment firm for the job opportunity offered in the ETA Form 9089.” (AF 1). Therefore, the CO determined that the reason for denial was valid pursuant to 20 C.F.R. § 656.17(e)(1)(ii)(F) and thus forwarded the case to BALCA. (AF 1-2).

On October 26, 2010, BALCA issued a Notice of Docketing. Employer filed a Statement of Intent to Proceed on November 9, 2010. On December 22, 2010, the CO filed a Statement of Position requesting affirmation of the CO’s denial of labor certification.

DISCUSSION

Under 20 C.F.R. § 656.17(e)(1)(ii), one of the additional recruitment steps an employer can utilize in advertising a professional occupation is recruitment through a private employment firm. The regulation at 20 C.F.R. § 656.17(e)(1)(ii)(F), provides, in pertinent part:

The use of private employment firms or placement agencies can be documented by providing documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation for which certification is sought.

The regulations require an employer to maintain all supporting documentation of all recruitment steps taken and all attestations made in the application for labor certification for five years. 20 C.F.R. §§ 656.10(f), 656.17(a)(3), 656.17(e)(1). A substantial failure by an employer to provide the documentation required by the audit will result in the application for permanent labor certification being denied. 20 C.F.R. § 656.20(b).

In interpreting the regulation at 20 C.F.R. § 656.17(e)(1)(ii)(G), the section dealing with recruitment through employee referral programs, the Board has determined that the use of the permissive “can” rather than “shall,” nonetheless “notifies employers” as to the elements required for “adequate documentation.” *Ove Arup & Partners Consulting Engineers, PC*, 2010-PER-00013, slip op. at 7 (July 20, 2010). Thus, the

Board held that documentation of a referral program is insufficient where it does not provide the basic information identified in the regulation. *Id.* at 8.

The Board has noted that 20 C.F.R. § 656.17(e)(1)(ii)(F) “does require that the Employer provide, ‘documentation sufficient to demonstrate that recruitment has been conducted by a private firm for the occupation.’” *Yosef, Inc.*, 2009-PER-00296. Slip op. at 4 (Feb. 3, 2010).

In the instant case, the CO properly found that Employer failed to comply with the regulations by failing to provide adequate documentation of its recruitment through private employment firms. The contracts provided were insufficient documentation because they did not provide the basic information identified in the regulation. The regulation uses the permissive “can” but nonetheless notifies employers that the private firm must conduct recruitment for the occupation for which certification is sought. Here, Employer failed to document that the recruitment firms conducted recruitment for the occupation listed in the ETA Form 9089. Therefore, the CO properly denied certification.

Based on the foregoing, we affirm the CO’s denial of labor certification.

ORDER

IT IS ORDERED that the denial of labor certification in this matter is hereby **AFFIRMED**.

For the Panel:

A

Lee J. Romero, Jr.
Administrative Law Judge

NOTICE OF OPPORTUNITY TO PETITION FOR REVIEW: This Decision and Order will become the final decision of the Secretary unless within twenty days from the date of service a party petitions for review by the full Board. Such review is not favored and ordinarily will not be granted except (1) when full Board consideration is necessary to secure or maintain uniformity of its decisions, or (2) when the proceeding involves a question of exceptional importance. Petitions must be filed with:

Chief Docket Clerk
Office of Administrative Law Judges
Board of Alien Labor Certification Appeals
800 K Street, NW Suite 400
Washington, DC 20001-8002

Copies of the petition must also be served on other parties and should be accompanied by a written statement setting forth the date and manner of service. The petition shall specify the basis for requesting full Board review with supporting authority, if any, and shall not exceed five double-spaced pages. Responses, if any, shall be filed within ten days of service of the petition, and shall not exceed five double-spaced pages. Upon the granting of a petition, the Board may order briefs.